STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH BARNETT,

Defendant-Appellant.

UNPUBLISHED
March 10, 2000

No. 208841
Recorder's Court
LC No. 96-000196

Before: Bandstra, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction in a bench trial of two counts of armed robbery, MCL 750.529; MSA 28.797, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant contends that the lineup from which he was identified was so impermissibly suggestive that it violated his right to due process. We disagree. We review the trial court's decision to admit identification evidence for clear error. *People v Kurylczyk,* 443 Mich 289, 303; 505 NW2d 528 (1993). To sustain a challenge to identification testimony, a defendant must show that the pretrial identification procedure was so suggestive, considering the totality of the circumstances, that it led to a substantial likelihood of misidentification. *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972). "The fact that there are actual differences in physical characteristics among line-up participants does not necessarily amount to impermissible suggestiveness. Differences are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up." *People v James*, 184 Mich App 457, 465-466; 458 NW2d 911 (1990), vacated in part on other grounds, 437 Mich 988 (1991).

One complainant described the masked gunman as a seventeen to twenty-one year old black male with a light complexion, standing 5'5" to 5'6" tall and weighing approximately 130 pounds. The other complainant testified that the masked gunman was a light-skinned black male between twenty and twenty-three years old, standing 5'6" to 5'7" tall, and weighing 150 to 170 pounds. Officer Gary Deneal testified that, based upon a composite of complainants' descriptions, he broadcast a description

of the gunman over the radio of a black male with a medium complexion, standing 5'8" tall, wearing a blue FILA jacket, and armed with a .25 semi-automatic handgun.

Defendant was one of nine people in the lineup. All of the lineup participants were black males between the ages of eighteen and twenty-eight, without beards, ranging in height from 5'5" to 6'6" tall and in weight from 130 to 300 pounds. Including defendant, three suspects were part of the lineup. Defendant was the second shortest and lightest of the participants. Four individuals were within one inch of defendant's height and thirty pounds of his weight. Defendant was allowed to choose where he wished to stand in the lineup. At the suggestion of the lineup attorney, plastic bags were placed over all of the suspects' heads to negate the possibility that the suspects might be identified by hair style alone.

Defendant argues that the instant case is analogous to *People v Wilson*, 20 Mich App 410, 413; 174 NW2d 79 (1969), in which this Court found a lineup impermissibly suggestive where the defendant was 5'3½ and the four other lineup participants were 5'7" to 5'10" tall. The lineup in this case, unlike the lineup in *Wilson*, contained four individuals who were comparable in height and weight to defendant. Two of these individuals more closely resembled the description of the armed suspect given to Officer Deneal than did defendant. While the other participants of the lineup were not at all comparable to defendant, the complainants were given a broad range of individuals from which to attempt to identify the potential suspects from the robbery. We cannot conclude that the trial court's ruling was clearly erroneous.

Defendant next argues that the trial court abused its discretion in denying defendant's motion for a new trial because (1) its findings of fact were logically inconsistent, and (2) the verdict was against the great weight of the evidence. We disagree. We review the trial court's decision whether to grant a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). A new trial may be granted on a ground which would support reversal on appeal or because the verdict resulted in a miscarriage of justice. MCR 6.431(B); *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). A motion for new trial based on the weight of the evidence should be granted only if the "evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

Defendant argues that he should have been granted a new trial because the trial judge's findings were logically inconsistent. We disagree. We recognize that a trial court, unlike a jury, has a duty to make logical, consistent rulings. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); see *People v Fairbanks*, 165 Mich App 551, 557; 419 NW2d 13 (1987) (facts do not support conviction for assault with intent to commit criminal sexual conduct in the second degree, MCL 750.520g(2); MSA 28.788(7)(2) when court finds insufficient evidence to establish an element of the offense). However, a trial court's findings are sufficient as long as it appears that the trial court was aware of the factual issues and correctly applied the law. *People v Wardlaw*, 190 Mich App 318, 321; 475 NW2d 387 (1991).

Defendant's mother's testimony touched on two issues: (1) she had given defendant and her brother $400 to $500 each when she received her monthly benefit check; and (2) defendant was at home with her at the time of the robberies. Presumably, the testimony about the money was material

because it could tend to explain why defendant had a large amount of money when he was arrested. The judge found defendant's mother to be a credible witness, saying that he believed her testimony that she had given defendant and his brother $400 to $500 each when she received her monthly benefit check. Although he went on to say, "[t]here was nothing that she said that I didn't believe," we do not see this statement as a finding that defendant was with his mother at the time of the robberies. Although we acknowledge that the trial judge's findings could have been clearer on this issue, we conclude from the context in which the judge's statement was made that he found only that he believed the mother's testimony about the money. Even assuming that this statement related to the alibi testimony, we conclude from the context in which the findings were made that the judge merely found that the mother believed that defendant was with her at the time of the robberies. Given that defendant had admitted to being involved in the robberies, that the complainants identified defendant, and that the complainants' pagers were recovered from defendant and his accomplice, we cannot conclude that the judge's offhand remark constituted a fact finding inconsistent with the verdict of guilty.

In addition, defendant argues that a new trial should have been granted because the verdict was against the great weight of the evidence. His argument is based primarily on the assumption that the judge's statement that there was nothing in what defendant's mother said that he did not believe was conclusive as to his alibi testimony. As we have already discussed, this evidence did not constitute a finding that the alibi testimony was true or, even if credible, that it was controlling. The evidence supporting the verdict was overwhelming; the two complainants identified defendant as the gunman, they picked him out of a photographic lineup, and defendant admitted being involved in the robberies. The court did not abuse its discretion in denying defendant's motion for new trial.

Defendant has filed a pro se brief in which he contends that he was denied effective assistance of counsel when his attorney moved for an adjournment instead of moving for an outright dismissal when complainants were late for trial. We disagree. To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.* Defendant filed a motion with this Court to remand his case back to the trial court for an evidentiary hearing on this issue, but this Court denied defendant's motion. Therefore, we must review this issue on the basis of the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant's case was originally set for trial on February 24, 1997. When the case was called for trial, the prosecutor informed the court that, due to a miscommunication with the officer in charge, subpoenas for the complaining witnesses were served late and only to other residents of the complainants' homes. The complainants were not in court. The trial judge indicated that she would resume the matter in one-half hour. Thereafter, defense counsel requested an adjournment, saying that he was in trial in another court on another of defendant's cases. The court granted the motion to adjourn and reset the case for trial. Later that day, the court dismissed without prejudice the charges against one of defendant's accomplices.

This Court will not substitute its judgment for that of defense counsel on matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Action appearing erroneous in hindsight does not constitute ineffective assistance of counsel if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *Pickens*, *supra* at 344. Defendant argues that his counsel was ineffective for not waiting the extra half-hour before moving to adjourn. Counsel moved for the adjournment so that he could appear in another of defendant's trials. Defense counsel could hardly be deemed ineffective for adjourning one of defendant's trials to represent defendant in another trial. This is clearly a matter of trial strategy. *Kvam*, *supra* at 200. We cannot conclude that counsel was ineffective.

We affirm.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald